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March 4, 2008

Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington D.C. 20554

RE: WC Docket No. 07-245

The Public Utility Commission of Oregon (OPUC or Oregon Commission) appreciates the opportunity to comment on the Federal Communication Commission's (FCC) Notice of Proposed Rulemaking on the Amendment of the Commission's Rules and Policies Governing Pole Attachments (Docket No. FCC 07-187).

The Oregon Commission is certified by the FCC to regulate pole attachments in Oregon. The Oregon Commission recently undertook a comprehensive review of its pole attachment rules and revised them significantly in Order No. 07-137. We offer comments on selected FCC inquiries based on our revised rules.

13a. We [FCC] inquire about the difference in pole attachment prices paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services.

Oregon licensees and attachers, and governmental entities[1] pay under the same pole attachment rate formula – a modified version of the federal cable rate formula. Utility-specific information is plugged in to the formula to calculate a rate.

Attachers also pay separate charges for such attachment costs as preconstruction activity, post-construction inspection, make ready costs, and related administrative charges. OAR 860-028- 0110[2] sets forth the details of Oregon's rental rate formula, carrying charge components, and separate charges. A copy of Oregon's pole attachment rules is enclosed with these comments.

Parties are allowed to agree on terms that differ from those in our rules. If they cannot so agree, our rules contain default rate formulas that can be contested at an administrative hearing before the OPUC.

[1] In Oregon, governmental entities are not licensees and not subject to pole attachment agreements. However, governmental entities are subject to the same permitting and rental rates as any licensee in the State.

In the event of a dispute, a party can challenge the formula and cost components set forth in our rules but the burden of proof is on them to show an alternative rate is just, fair, and reasonable.

13b. We [FCC] seek comment on how the states that regulate pole attachments handle issues that arise concerning rates and access.

Oregon uses a dispute resolution process. A utility or pole attacher may petition the Oregon Commission to resolve disputes related to a new or existing contract. Commission proceedings on the dispute may involve conduct of discovery by the parties, resolution of legal issues, and an evidentiary hearing as needed. The Oregon Commission issues a decision order, which may be appealed to the Oregon appellate courts.

15. We also seek data that may shed light on how many poles incumbent LECs own or control compared with the number of poles owned or controlled by electric utilities.

About 75 percent of the utility poles in Oregon that support both high voltage electric and communication networks are owned by electric utilities. ILECs own the rest. Oregon's electric utilities' share of these joint use poles has increased over time.

In Oregon's rural areas, electric utilities own all the joint-use poles. In Oregon's largest cities (i.e., Portland, Salem and Eugene), the split is approximately 65% (electric) to 35% (telephone).

26. We [FCC] tentatively conclude that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service, and we seek comment on that tentative conclusion.

All attachers in Oregon, including broadband Internet access service providers, are subject to the same pole attachment rate formula. Please refer to response 13a.

34. We [FCC] seek comment on whether, when they are "telecommunications carriers," wireless providers are entitled to the telecom rate as a matter of law, or whether we should adopt a rate specifically for wireless pole attachments.

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[2] Definitions for the rules are found in OAR 860-028-0020

The Oregon Commission applies the same rules to wireless telecommunication carriers as other pole attachers. Our Order No. 07-137 set forth our reasoning:

> Attachments by wireless carriers are covered by the federal pole attachment statute. *See National Cable & Telecommunications Assn., Inc. v. Gulf PowerCo.*, 534 US 327, 340 (2002). The Supreme Court addressed arguments that only wires
> and cables were governed by the statute, and not antennae. *See id.* The Court noted that the statutory language did "not purport to limit which pole attachments are covered," and that the broader term "associated equipment" allowed room for regulation of wireless attachments. *See id.* at 340-341. The Court also dismissed arguments that poles are essential facilities for wireline services, but not wireless services, deferring to the FCC's decision to not distinguish between providers of telecommunications services.
> The Oregon laws governing pole attachments, though passed in 1979 before the Telecommunications Act of 1996 broadened the federal law, are broad in scope. For instance, an attachment means "any wire or cable for the transmission of intelligence," supported by "any related device, apparatus, or auxiliary equipment" installed on any pole "or other similar facility" that is owned by a utility. *See* ORS 757.270(1). Similarly broad is the definition of licensee: "any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways." ORS 757.270(3). Further, the Commission has the authority to regulate the "rates, terms and conditions for attachments by licensees to poles or other facilities" of utilities. *See* ORS 757.273.
>
> This Commission has certified to the FCC that it will regulate pole attachment matters, which could be construed to encompass wireless attachments. While the Oregon commission is not required to follow federal statutes precisely, the Commission has found that federal law is instructive. *See* Order No. 05-981. In addition, the legislature provided the Commission broad authority to regulate attachments. For these, we conclude that the pole attachment statutes, ORS 757.270 through ORS 757.290 and ORS 759.650 through ORS 759.675, give the Commission jurisdiction to regulate wireless attachments to poles, and the rules adopted here may also apply to wireless attachments that are also governed by the federal statutes. The OJUA argued that there is no clear definition of "wireless" to specify what kind of operators should have access to poles regulated by the Commission. *See* OJUA comments, 1 (Oct 24, 2006). We exercise our jurisdiction only to those wireless carriers who would be covered by federal

law, to ensure that they fall within the scope of 47 USC 224, which this state has chosen to preempt. *See National Cable & Telecommunications Assn., Inc.*, 534 US at 342.

Pole owners and Staff have argued that the guidelines established here may not fit wireless carriers, and in a contested case, those arguments may effectively rebut the default provisions adopted here. The FCC acknowledged arguments that wireless attachments may use more space, fewer poles, and result in higher costs than traditional wireline attachments. However, the FCC also asserted, "If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis." *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 ¶ 42 (rel Feb 6, 1998). This Commission adopts a similar approach in this order. Ideally, the principles set forth in these rules will establish the framework for participants to negotiate their own contracts.

We will not delay application of these rules until a docket specifically related to wireless carriers is completed. However, a docket regarding wireless carriers, including safety concerns, should be opened as soon as possible. Until that time, the Commission will resolve issues on a case-by-case basis, considering the contract parameters adopted in this order.

37. Parties also expressed concerns regarding performance of make-ready work, including timeliness, safety, capacity, and the use of boxing and extension arms... We [FCC] seek comment on these and any other pole attachment access concerns.

OPUC's pole attachment rules related to make-ready work are covered under OAR 860-028-0100 (Application Process for New and Modified Attachments).

All Oregon entities must construct, operate and maintain their attachments and associated facilities in compliance with the National Electrical Safety Code (NESC) per ORS 757.035 and OAR 860-024-0010.

In Oregon, the use of "boxing" of poles is prohibited because it violates NESC Rule 213 (Accessibility) or other related rules including, but not limited to: a) Rule 236 (Climbing Space); b) Rule 237 (Working Space); c) Rule 238 (Vertical Clearance between Certain Communications and [Electric] Supply Facilities located on the same Structure); and d) Rule 238E (Communications Worker Safety Zone). Some parties have urged that the prohibition

against boxing be eliminated. But, even if the NESC did not prohibit boxing, very serious safety concerns would arise, because whenever a person climbs a pole, they must use a safety harness for climbing. Boxing of poles would prevent the climber from continuing the climb without unlatching the safety harness to overcome the boxing barrier, which creates an unwanted safety condition.

Because of the safety concern and the knowledge from our experience in Oregon that most attachers and pole owners do not have sufficient numbers of bucket trucks and other high-lift equipment to handle the repairs needed in responding to emergencies and disasters, our recommendation is for the FCC to follow the NESC.

The Commission also has concerns with the FCC authorizing drop lines to be installed on poles without permission of the owner as some parties have recommended. Service lines (i.e., lines that connect the distribution system to the customer's building), like other attachments, are required to be permitted in Oregon to ensure the safety of the pole, the public and line workers. The Oregon Commission has long recognized the need for prompt attachment of service lines. Consequently, the OPUC has rules allowing an attacher to install a service drop on a pole without prior owner permission as long as the attacher complies with the pole owner's contract and the NESC, and the attacher applies to the owner for a permit within 7 days of the service drop installation.[3]

Respectfully submitted,

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

cc: FCC Commissioners

Attachment – Oregon PUC Order No. 07-137

[3] See note 2 and refer to OAR 860-028-0020(27) and OAR 860-028-0120(3) made effective in 2001.

ORDER NO. 07-137

ENTERED 04/10/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506/ AR 510

In the Matters of	)	
	)	
Rulemaking to Amend and Adopt Rules	)	
in OAR 860, Divisions 024 and 028,	)	
Regarding Pole Attachment Use and	)	
Safety (AR 506)	)	ORDER
	)	
and	)	
	)	
Rulemaking to Amend Rules in	)	
OAR 860, Division 028 Relating to	)	
Sanctions for Attachments to Utility	)	
Poles and Facilities (AR 510).	)	

DISPOSITION: PERMANENT RULES ADOPTED

This docket represents the culmination of more than one year of effort by Commission Staff and industry participants in revising pole attachment rules. After consideration of all of the comments and legal and policy issues, we adopt the AR 506 Division 028 rules set out in Appendix A and AR 510 rules set out in Appendix B.

Participants have submitted multiple rounds of comments and attended several sessions of workshops before docket AR 506 was officially opened, throughout phase one, and now in phase two. We consider all of the comments, submitted in writing, as well as in workshops, to be part of the record that forms the basis for this decision.

On July 1, 2006, the notice for the second phase of AR 506 was published in the Secretary of State Bulletin, signaling the start of the docket to evaluate proposed changes to several Division 028 rules. At the behest of participants, another docket was opened, AR 510, to address sanction rules and the remaining rules in Division 028. That notice was published in the October 1, 2006, Secretary of State Bulletin.

Participants in this phase included Commission Staff (Staff), the Oregon Joint-Use Association (OJUA), Portland General Electric Company (PGE), Pacific Power & Light dba PacifiCorp (PacifiCorp), the Oregon Rural Electric Cooperative Association (ORECA), Oregon Telecommunications Association (OTA), Idaho Power Company (Idaho Power), Qwest Corporation (Qwest), Verizon Northwest Inc. (Verizon), Charter Communications (Charter), Central Lincoln Peoples' Utility District (CLPUD),

Northern Wasco County Peoples' Utility District (NWCPUD), Oregon Cable Telecommunications Association (OCTA), and United Telephone Company of the Northwest, dba Embarq (Embarq). In addition, T-Mobile West Corporation, dba T-Mobile (T-Mobile), New Cingular Wireless PCS, LLC (Cingular), Sprint Spectrum L.P. (Sprint), and Nextel West Corp. (Nextel) participated in this docket (collectively "the wireless carriers").

The docket schedules proceeded in tandem, with several rounds of comments and workshops, including a workshop with Commissioners on October 12, 2006. The public comment period closed in both dockets on November 17, 2006. This order adopts permanent rules in both dockets.

In this order, we first examine applicability of the rules to wireless providers, and then access to transmission facilities. Next, we analyze rental rate formula issues for pole attachments. Then, we evaluate other issues raised in docket AR 506. Finally, we discuss sanctions rules as addressed in docket AR 510.

WIRELESS PROVIDERS

In submitting issues lists, the wireless carriers filed recommended issues that fell within the scope of this proceeding. No participant objects to the issues themselves, but several participants, including Staff and OJUA, argue that the rules in Division 028 adopted here should not apply to wireless carriers.

Staff argues that the wireless industry is an emerging industry with new challenges that should be thoroughly considered in another docket before applying the rules considered here. Staff asserts that this rulemaking has been split into two phases, at the suggestion of the OJUA, to first resolve safety issues before approaching contract issues; safety issues related to wireless attachments should also be vetted first, so that the participants can apply lessons learned from that process before analyzing contract issues. According to Staff, this rulemaking is based on the assumption that all communications attachments will be in the communications space on a pole, and not located in or above the electric supply space, as wireless attachments sometimes are. Staff points to the California commission, which is undertaking separate dockets to analyze safety issues related to wireless antennae in communications space and on top of poles. Staff states that "[n]either the wireless industry nor wireline industries * * * have submitted proposals to Staff on annual rental rates and charges that are appropriate for wireless attachments. The respective industries need to come forward with these proposals." AR 506 Staff comments, 2 (Nov 8, 2006).

The OJUA also recommends that a separate docket be opened to consider wireless issues. The OJUA expresses concern that the Commission will mandate access without full consideration of which wireless entities should be allowed to access poles, and that the Commission could mandate access to towers. The OJUA sets up its framework for consideration of the relevant issues: (1) whether the technology seeking inclusion within the rules is in need of protectionary regulation; (2) whether the

technology serves the public; and (3) whether the technology needs access to poles or towers to serve the public. *See* OJUA comments, 2 (Oct 24, 2006). The OJUA also cautions that wireless issues may not be properly noticed in this rulemaking, and that the Commission should avoid rushing into any actions that may have unintended consequences. If the Commission does include wireless issues in this docket, the OJUA requests that the timelines be extended.

PGE, PacifiCorp, and Idaho Power filed joint comments emphasizing the importance of opening a new docket to review wireless issues. *See* Joint Comments of Portland General Electric, PacifiCorp, and Idaho Power Company (Nov 17, 2006). The joint utilities review the progress of wireless pole attachment dockets around the country, noting the complexity of the technical requirements of wireless attachments and the attendant rates issues. *See id.* CLPUD and NWCPUD also support a separate rulemaking to address wireless issues, arguing that they were raised late in this proceeding. *See* CLPUD and NWCPUD comments, 15 (Nov 17, 2006).

Conclusion

Attachments by wireless carriers are covered by the federal pole attachment statute. *See National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 US 327, 340 (2002). The Supreme Court addressed arguments that only wires and cables were governed by the statute, and not antennae. *See id.* The Court noted that the statutory language did "not purport to limit which pole attachments are covered," and that the broader term "associated equipment" allowed room for regulation of wireless attachments. *See id.* at 340-341. The Court also dismissed arguments that poles are essential facilities for wireline services, but not wireless services, deferring to the FCC's decision to not distinguish between providers of telecommunications services.

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This Commission has certified to the FCC that it will regulate pole attachment matters, which could be construed to encompass wireless attachments. While the Oregon commission is not required to follow federal statutes precisely, the Commission has found that federal law is instructive. *See* Order No. 05-981. In addition, the legislature provided the Commission broad authority to regulate attachments. For these, we conclude that the pole attachment statutes, ORS 757.270 through ORS 757.290

and ORS 759.650 through ORS 759.675, give the Commission jurisdiction to regulate wireless attachments to poles, and the rules adopted here may also apply to wireless attachments that are also governed by the federal statutes. The OJUA argued that there is no clear definition of "wireless" to specify what kind of operators should have access to poles regulated by the Commission. *See* OJUA comments, 1 (Oct 24, 2006). We exercise our jurisdiction only to those wireless carriers who would be covered by federal law, to ensure that they fall within the scope of 47 USC 224, which this state has chosen to preempt. *See National Cable & Telecommunications Assn., Inc.*, 534 US at 342.

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TRANSMISSION FACILITIES

Arguments relating to transmission facilities fell into two categories: (1) should the Commission mandate access to transmission facilities? and (2) should rates for distribution poles and transmission poles be calculated separately or together? We answer each in turn.

Access

Some participants, in particular wireless carriers, recommend that the rental rate for attachments also apply to transmission towers ("towers"). These participants point to ORS 757.270(1), which applies to attachments installed upon any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or other similar facility or facilities. *See* AR 506 Joint comments of T-Mobile, Cingular, and Sprint/Nextel ("Joint Wireless Comments"), 9 (Nov 17, 2006) (internal citations omitted). The wireless carriers acknowledge *Southern Company, et al v. FCC*, 293 F3d 1338 (11th Cir 2002), in which the court held that the federal Pole Attachment Act does not apply to transmission towers.

These participants contrast the language of the federal law with the wording of the Oregon statute, which is more broadly stated. They also point to a decision in Massachusetts, in which that commission found that it had jurisdiction to require non-discriminatory access to towers for wireless carriers under a state statute with wording similar to that in Oregon. *See In re Boston Edison Company*, 2001 Mass PUC LEXIS 69, at *165 (Mass DTE Dec 28, 2001).

PacifiCorp asserts that Oregon law was intended to supplant federal law, but only to the extent that federal law asserted jurisdiction over distribution poles. *See* PacifiCorp comments, 8 (Nov 17, 2006). To apply Oregon law only to the extent of the federal law, PacifiCorp recommends that the Commission interpret the inexact term "poles" to refer only to distribution poles. *Id.* For these reasons, PacifiCorp seeks to exclude transmission poles and towers from Commission rules defining poles and pole costs. *See id.* at 9.

CLPUD and NWCPUD (PUDs) also argue that the Commission should not mandate access to transmission towers. *See* CLPUD and NWCPUD comments, 14 (Nov 17, 2006). The PUDs interpret ORS 757.270(1) to apply only to distribution facilities. *See id.* Further, they assert that transmission towers are "megastructures," carry a much greater load, and affect electric reliability across state lines. *See id.* For these reasons, the PUDs urge the Commission to find that the pole attachment statutes do not apply to transmission towers. *See id.* at 15. In addition, the PUDs note that new technology is resulting in transmission towers that resemble poles. *See id* 10. The PUDs express concern that these new "poles" are carrying "many hundreds of kV of power," and should have higher standards for access. *See id.* To this end, the PUDs propose a definition for transmission poles that includes transmission facilities carrying less than 230 kV, and defines transmission towers as those facilities carrying 230 kV or more. *See id.*

Idaho Power argues that the Commission should not mandate access to transmission poles, as well as transmission towers. *See* Idaho Power comments, 6-7 (Nov 17, 2006). The utility notes that more than half of its transmission poles and towers are located on private property, and that other attachers will not always have easements to access transmission facilities. *See id.* at 7. With these logistical difficulties, Idaho Power expresses concern about whether it could comply with a mandate for nondiscriminatory access to transmission poles. *See id.*

Rates and Terms

Verizon argues that pole rental rates should be calculated separately for transmission poles and distribution poles. Verizon notes that transmission poles are often much higher than distribution poles, and therefore the rent is much more for transmission poles. The company asserts that blending the two kinds of poles together would inappropriately raise pole rental costs, and so they should be kept separate. In fact, Verizon argues that there should be separate pole attachment contracts for transmission poles and distribution poles. *See* AR 506 Verizon comments, 5-7 (Nov 17, 2006). Along

these lines, Verizon also proposes language to make it clear that "pole cost" refers to distribution poles. *See id.* at 11.

Charter also recommends that separate formulas be used for distribution poles and transmission poles. The company asserts that combining the two categories results in unnecessarily high carrying charges for licensees who are attached to distribution poles but not transmission poles. *See* Charter comments, 10 (Nov 17, 2006).

CLPUD and NWCPUD support language permitting pole owners to calculate and separately state distribution pole rental rates and transmission pole rental rates, provided that the "carrying charge" calculations were based on separate accounting data. *See* CLPUD and NWCPUD comments, 3 (Nov 17, 2006). ORECA supports comments by the PUDs regarding transmission poles, and argues that utilities should be able to separately negotiate rates for transmission poles. *See* ORECA comments, 3 (Nov 17, 2006).

CLPUD and NWCPUD also recommend a bifurcated application process for transmission and distribution poles. *See* CLPUD and NWCPUD comments, 10-12 (Nov 17, 2006). The PUDs state that they install distribution poles in anticipation of pole attachment requests, and build extra capacity to provide space for other attachers. *See id.* at 10-11. On the other hand, they state that transmission poles are designed and installed specifically to carry only the loading planned by the electric utility, with no extra capacity for other attachers. *See id.* at 11. For these reasons, the PUDs propose an extended application processing time for attaching to transmission poles and to not permit an automatic right of attachment to transmission poles. *See id.* at 11-12.

Conclusion

Oregon law provides for access to "any pole or in any telegraph, telephone, electrical, cable television or communications right of way, duct, conduit, manhole or handhole or other similar facility." ORS 757.270(1). In determining whether a transmission tower is an "other similar facility," we look to the earlier items for comparison. *See State ex rel OHSU v. Haas*, 325 Or 492, 503 (1997). This matter has been considered on the federal level; the Eleventh Circuit Court of Appeals noted that "'[p]oles, ducts, and conduits' are regular components of local distribution systems and not interstate transmission systems." *Southern Company et al v. FCC*, 293 F3d 1338, 1344 (11th Cir 2002). Towers that serve only transmission lines were found to be outside the purview of the federal pole attachment statute, but "local distribution facilities, festooned as they may be with transmission wires," fell within the statute and subsequent regulations. *See id.* at 1345. We therefore conclude that "other similar facilit[ies]" as that term is used in ORS 757.270(1) do not include towers that exclusively serve

electrical transmission lines, and so do not mandate that electric companies allow access to their transmission towers.[1]

This inquiry also helps define "poles" in ORS 757.270(1). We agree that the word "pole" is an inexact term, subject to various interpretations. *See Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 354 (2000). To determine the meaning, courts look to the intent of the legislature, using "indicators such as the context of the statutory term, legislative history, a cornucopia of rules of construction, and their own intuitive sense of the meaning which legislators probably intended to communicate by use of the particular word or phrase." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224 (1980). The legislative history behind the pole attachments statutes, Oregon Laws 1979, chapter 356, indicates the legislature's intent to adopt federal law, with the exception that consumer-owned utilities would also be subject to the pole attachment statute. *See* Testimony, House Committee on State Government Operation, SB 560A, June 19, 1979, Ex A (statement of Ray Gribling, representing Pacific Northwest Bell, General Telephone, Oregon Independent Telephone Association, and privately owned electric utilities). Further, the Eleventh Circuit has interpreted the term "pole" in the federal statute to be limited to distribution facilities, including those that may also carry transmission lines. Therefore, we follow suit and limit mandated access to poles that carry distribution lines, which includes poles that carry both distribution and transmission lines.

In addition to this review of federal law, we are persuaded by arguments made by CLPUD and NWCPUD, Idaho Power, and others that transmission towers are taller than distribution poles, have higher levels of voltage, are custom built to accommodate transmission lines, and are generally more dangerous than distribution poles. Their arguments support the Commission's decision to not allow access to facilities used exclusively for transmission.

In light of the decision that transmission facilities do not fall under Oregon's pole attachment statute, and for reasons cited by Verizon, rental rates and application processes for distribution facilities should be conducted separately from those

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[1] The Joint Wireless Comments cite a Massachusetts commission decision in which the commission stated that, if cable companies were denied access to transmission towers, they could file a complaint with the commission pursuant to the pole attachment statue and regulations. *See* Joint Wireless Comments, 9-10 (citing *Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in DPU 93-97*, DPU/DTE 97-95, 2001 Mass PUC Lexis 69 (Mass DTE Dec 28, 2001)). In that case, a regulated energy utility had an affiliate in the cable and telecommunications industries. The Massachusetts commission considered whether the utility cross-subsidized the affiliated cable and communications company by giving them exclusive access to the utility's rights-of-way, in violation of state law requiring non-discriminatory access. *See id.* at *145-*182. The Massachusetts commission found that related contractual provisions were never enforced and were, in any event, "nugatory" because they were contrary to state law. *See id.* at *153. If the utility granted discriminatory access to its affiliate, and denied access to a competitor communications or cable company, the Massachusetts commission stated that the aggrieved party could file a complaint seeking equal access. *See id.* at *161. That decision does not persuade this Commission that, without the presence of that specific situation, we should require general access to transmission facilities for communications and cable companies.

related to transmission facilities. If there are poles that fall under the Oregon statute that also have distribution lines on them, but that are accounted for in the transmission accounts, then the transmission accounts should be used to calculate rental rates on those poles.

RENTAL RATES

The subject of rental rates has several elements. First, we resolve the participants' dispute as to whether to use the FCC's cable rate formula or telecommunications rate formula. As part of that dispute, participants argued as to how usable space should be measured; we address that issue separately. Next, we evaluate the components of the carrying charge, and the charges that should be broken out separately, as opposed to being rolled into the fully allocated cost. After these fundamental decisions, we consider whether inflation should be factored into rates and the cost of money for consumer-owned utilities.

Rental Rate Formula

Idaho Power argues that any rental calculation must take into consideration all of the space taken by a licensee's attachment, including the sag of the cables while maintaining minimum ground clearance in adjacent spans, clearance between multiple licensees' attachments, and safety clearance between the highest communication attachment and the lowest power attachment. *See* Idaho Power comments, 2 (Oct 25, 2006). If the licensee does not bear the full cost of the space related to its attachments, Idaho Power argues, then the pole owner is unfairly subsidizing the licensee. *See id.* Idaho Power calculates that, under the current formula, there must be at least nine licensees on a pole before the pole owner subsidy is eliminated. *See id.* at 6. To remedy this, Idaho Power proposes language for "usable space," as well as a new definition for "space used." Idaho Power asserts that its proposal closely resembles the FCC's telecommunications formula. *See* Idaho Power comments, 7-8 (Nov 17, 2006).

CLPUD and NWCPUD also support Commission adoption of the telecommunications rate formula to prevent subsidization of attachers by pole owners. *See* CLPUD and NWCPUD comments, 12-13 (Nov 17, 2006). The PUDs cite Idaho Power's comments in support of its proposition that Oregon law does not compel adoption of only the cable rate formula. *See id.* at 13.

After analyzing Oregon's rental rate statute, ORS 757.282, PacifiCorp argues that the Legislative Assembly gave the Commission broad authority to adopt a rental rate formula. *See* PacifiCorp comments, 13-16 (Nov 17, 2006). The utility asserts that this broad authority allows the Commission to adopt a rental rate formula that more closely resembles the telecommunications rate formula. *See id.*

On the other hand, OCTA argues that Oregon law precludes the Commission from adopting Idaho Power's proposed language. *See* OCTA comments,

6-7 (Nov 17, 2006). OCTA supports the FCC cable formula because it is consistent with Oregon law, and also because there has been substantial litigation, so there are many decisions to draw on as precedent; there would be greater transparency because most information is publicly available; and no additional accounting would be required because the formula would use existing accounts. OCTA expresses the concern that other proposals would be more complicated and could result in "something like rate cases." OCTA comments, 3 (Nov 17, 2006).

Charter also supports a carrying charge calculated in the same way as the FCC cable formula, because it relies on publicly available information. The company insists that any formula rely on publicly available data to verify whether rates are just and reasonable, without a full rate case. *See* Charter comments, 9 (Nov 17, 2006).

The OJUA was unable to reach any consensus on rates, but encourages the Commission to consider its three principles as applied to rates: rates should be transparent, no party should subsidize another party, and the Commission should adopt uniform methodologies in the calculation of charges. *See* AR 506 OJUA comments, 1-2 (Nov 16, 2006).

Staff notes that the FCC has two formulas for pole-attachment rental rates, one for cable operators, implemented in 1978, and another for telecommunications providers, adopted after the Telecommunications Act of 1996. *See* Staff comments, 7 (Nov 17, 2006). The telecommunications formula uses a different methodology for determining the proportion of pole space that is attributable to the attachment and allocates the cost of the "unusable" portion of the pole based on the total number of pole occupants rather than the portion of space occupied by the attachment, according to Staff. *See id.* Staff concedes that Oregon's formula is similar to the cable formula, but recommends that the Commission review the attachment rate principles that led to the telecommunications formula. Staff asserts that those principles may be more equitable in today's market, particularly as applied to wireless providers. *See id.* Staff recommends that a new docket consider the applicability of the telecommunications formula, but that for this docket, a modified cable formula should be adopted.

Conclusion

We conclude that a modified cable rate formula is the most appropriate for calculating pole rental rates under ORS 757.282. In so doing, we note the progression of legislative history behind the pole attachment statutes in Oregon. First, in 1978, Congress passed legislation governing pole attachments and establishing the range of rates that pole owners could charge for rent: "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." Pub L No 95-234, § 6(d). Next, in 1979, the Oregon legislature passed its own pole attachment law, which mirrored

the federal law in most respects, including the rate rental formula, but differed in that the state law applied to poles owned by publicly owned utilities, and the federal law exempted publicly owned utilities. *See* Or Laws 1979, ch 356; *see also* Testimony, Senate Committee on Environment and Energy, SB 560, Ex D (April 5, 1979) (statement of Ray Gribling). In the Telecommunications Act of 1996, Congress created a new rental rate formula which allocates the unusable space, and which has become known as the telecommunications rate formula. *See* PL 104-104, § 703(e). The FCC adopted rules implementing this formula in 1998. *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 ¶¶ 43-79 (rel Feb 6, 1998). In 1999, the Oregon legislature revisited the pole attachment statutes, and in fact changed the usable space calculation to add 20 inches for compliant attachers. *See* Or Laws 1999, ch 832, § 7. However, the 1999 Oregon legislature did not adopt, nor did any party argue for, the telecommunications rate, even though it was established at the federal level.

Idaho Power and others supporting its proposal, as well as Staff, urge the Commission to consider the telecommunications formula. These participants argue that the telecommunications rate formula better considers the impact of several occupants on a pole. However, the cable formula has been found to fairly compensate pole owners for use of space on the pole. *See Alabama Power Company v. FCC*, 311 F3d 1357, 1370-71 (11th Cir 2002). In addition, use of the cable rate will allow parties to rely on the case law interpreting that rate, providing guidance in forming their contracts. Based on the legislative history, as well as consideration of the many arguments made by the participants, we conclude that we will follow the cable rate formula and the subsequent FCC and court decisions interpreting it.

Usable Space

Verizon raises the argument that pole owners should only be able to charge occupants for attachments in the usable space on a pole. If attachments in unusable space are added to the numerator, but "usable space" is still the denominator, Verizon asserts that the pole rental rate will be unduly elevated. *See* AR 506 Verizon comments, 3-4 (Nov 17, 2006). The company states that it has historically been allowed to install certain equipment, such as splice boxes and risers, in the space below the communications space at no charge and with no permit. Because the equipment supports existing attachments for which the occupant already pays rent, Verizon argues that it should not have to pay rent for the additional equipment. *See id.* at 13-14. If there is a charge for these attachments, Verizon requests that the space occupied by the attachments should be included as usable space for purposes of calculating the pole rental rate formula. *See id.* at 14.

OCTA expresses concern that some pole owners charge per attachment, and not per foot of space used by occupants, in contravention of the FCC formula and this Commission's decision in UM 1087. *See* OCTA Comments, 7 (Nov 17, 2006).

ORECA argues that any attachments made outside the usable space should be made through separate negotiations by the parties to a contract. *See* ORECA comments, 4 (Nov 16, 2006).

Staff argues that pole owners should be permitted to charge for attachments in the unusable space on a pole. Staff reasons that "[a]ttachments such as cable television power supplies, telephone terminal boxes, and other equipment located in the support space on poles result in increased burdens and costs to pole owners and occupants," especially when poles have to be replaced or relocated. *See* Staff comments, 4 (Nov 17, 2006). Staff agrees that, with owner authorization, an occupant may put equipment in the support space on a pole, but Staff asserts that the occupant should pay appropriate rent for such attachments in proportion to the vertical space used on the pole. This is in agreement with the 1984 rulemaking on this subject, set out in Order No. 84-278, which required a licensee's attachment rate to be determined by the "total vertical space" occupied by the attachment on the pole, not by the "total vertical usable space" used. While the "unusable space" may be used for certain attachments, such as antennae, terminal boxes, power supply enclosures and the sort, Staff argues that there should be a charge for such attaching that equipment.

Conclusion

Usable space should be calculated as that which does not include the space below the minimum clearance and also excludes the 40 inches of safety clearance between communications lines and electric lines, except as provided by statute.[2] We further conclude that the rental rate formula should apply only to the wire or cable attachment in the usable space. Other standard attachments that are in the unusable space are usually small, do not interrupt the climbing space, and do not create extra load; for those attachments, there should be no extra charge. However, we also note Staff's argument that some items attached in the unusable space have become large and unwieldy, resulting in excessive pole maintenance costs. Participants may raise this matter again in a new docket to consider issues related to wireless attachments on poles. Because the Commission is reserving judgment on this issue, no provision will be adopted at this time.

Carrying Charge Components and Separate Charges

Verizon proposes that the carrying charge be based on FCC ARMIS accounts or FERC Form 1 accounts, because information regarding those accounts is also publicly available. *See* AR 506 Verizon Comment, 5, 8 (Nov 17, 2006). Verizon also argues that administrative charges related to operation and maintenance of poles should

[2] In 1999, the legislative assembly revisited the issue of whether the 40 inches of clearance between the communications lines and the electric lines should be included in usable space. As part of a larger package, including creation of the OJUA and development of a sanctions framework, the legislature decided that 20 inches would only be includable in the rental rate formula if the attacher complied with all applicable rules and contractual provisions. *See* Minutes, House Commerce Committee, HB 2271, Minutes, p 4, Tape 41A (April 23, 1999) (statement of Michael Dewey).

be folded in with the carrying charge, and not allocated separately to licensees. *See id* at 7-8 (Nov 17, 2006). Verizon also seeks to exclude separate routine inspection charges and argues that those should be calculated in the pole rental rate formula. *See id* at 10. To do so, Verizon proposes a definition for the term "routine inspection," so that when a pole owner inspects its own facilities, it also examines the occupants' attachments and folds the cost of the entire routine inspection in the carrying charge. *See id.* at 14-17. Verizon also proposes a definition of post-construction inspection that will only apply to new attachments. *See id.* at 12. The company also supports Charter's proposal that the occupant be advised of post-construction inspections so the occupant can choose to participate, such inspections must be held within 30 days of the completion of construction, the occupant must be provided with the results in writing, and the pole owner can recover all costs associated with these inspections. *See id.*

Charter expresses concern about Staff's proposed definition of "Special inspection," for which a separate charge would be allowed. *See* Charter comments, 9 (Nov 17, 2006). Charter argues that special inspections should be defined as field visits made at the request of the licensee, and not any field visit for a non-periodic inspection. *See id.* Charter asserts that Staff's definition would permit "the kind of costly, erroneous, repetitive and unnecessary inspections that attachers have complained about throughout this process." *Id.* at 9-10. Charter proposes a definition of "Periodic Inspection" that mirrors Verizon's "Routine Inspection" proposal.

CLPUD and NWCPUD argue that the rate formula should not result in cross-subsidies, even among joint users. *See* CLPUD and NWCPUD comments, 13 (Nov 17, 2006). The PUDs argue that some attachers are more "prolific" than others, resulting in many additional costs that should not be shared among all attachers. *See id.* The PUDs prefer to charge permit fees and actual costs on a separate basis, and pledge to keep clear records to show that the costs are not recovered twice in this process. *See id.* at 13-14.

PacifiCorp also expresses concern that pole owners should be permitted to charge separate costs and to not roll all costs into the fully allocated carrying charge. *See* PacifiCorp comments, 17-18 (Nov 17, 2006). The utility argues that without being able to charge separately for these costs, it will not be able to recover its costs of pole management, and some pole occupants would unwittingly subsidize others. *See id.*

PGE argues that it is able to deduct certain charges from its FERC accounts and can calculate them separately. *See* PGE comments, 7-8 (Nov 17, 2006). PGE proposes that separate, incremental costs be recorded in separate accounts and audited by independent auditors and Commission staff. *See id.*

ORECA supports Staff's recommendation that rental rates not include attachment of support equipment and permit application processes. *See* ORECA comments, 3 (Nov 17, 2006). ORECA asserts that utilities should be able to bill those costs directly to the cost-causer, and should not be rolled into the rental rate formula because pole owners would not be made whole for the costs incurred. *See id.* at 3-4.

Staff argues that a pole owner should be allowed to recover out-of-pocket costs and require reasonable advance payments from an applicant for each new attachment on a pole-by-pole basis, including all costs for administration, engineering, inspection, and construction necessary for the new attachment. *See* Staff comments, 6 (Nov 17, 2006). Application processing, preconstruction activity, make ready, and post-construction inspection for a new attachment are all considered by Staff to be one-time activities that are non-recurring. Staff supports an owner's option to recover all costs for non-recurring activities until the new attachment installation is placed in service in compliance with NESC rule 214(A)(1) and the owner accepts the attachments. Because new attachment up-front costs can vary widely depending on the quality of the installation and the specific the facilities involved, Staff argues that a licensee should have to pay for the unique costs caused by the new attachment. Further, Staff asserts that a licensee should have to pay reasonable fees with its application, to compensate the pole owner for administrative costs that may be incurred, even if an attachment is never made. *See id.* at 7.

Conclusion

In adopting the federal cable rate formula, we look to decisions interpreting that formula as guidance in deciding which costs should be factored into the carrying charge and which should be charged separately. The cable rate has been described as a range between the incremental cost of the additional attachment and the fully allocated cost. *See* Testimony, House Committee on State Government Operation, SB 560A, June 19, 1979, Ex A (statement of Ray Gribling, representing Pacific Northwest Bell, General Telephone, Oregon Independent Telephone Association, and privately owned electric utilities).

The FCC has struck down attempts to have the best of both worlds, that is, a nearly fully allocated rate and additional recurring costs added to that rate. *See In the Matter of Texas Cable & Telecommunications Association, et al v. Entergy Services, Inc.*, 14 FCC Rcd 9138, *9139 (rel June 9, 1999) ("Texas Cable"). The FCC concluded that a "rate based upon fully allocated costs * * * by definition encompasses all pole related costs and additional charges are not appropriate," in rejecting flat fees for pre-construction surveys or application processing. *Id.* at *9141. However, fees to reimburse for actual engineering costs to prepare for attachment are appropriate. *Id.* at *9144. For instance, the FCC rejected one utility's attempt to break out administrative costs separately from the fully allocated rate, stating, "A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses." *See In the Matter of the Cable Television Association of Georgia v. Georgia Power Company*, 18 FCC Rcd 16333, *16342 (rel Aug 7, 2003).

Following these decisions, we decline to adopt the recommendations that administrative costs for pole maintenance and operation be broken out separately. Separate charges may be made for new attachment activity costs, including

preconstruction activity, post-construction inspection, make ready costs, and related administrative charges, to accommodate specific changes for pole occupants. Further, only post-construction inspections and special inspections requested by pole occupants may be charged separately; all other inspection charges, including safety inspections made under Division 024 rules, should be calculated in the rental rate. *See In the Matter of the Cable Television Association of Georgia*, 18 FCC Rcd at *16341-42. For this reason, we also adopt a definition of "Periodic Inspection" to accommodate safety and other inspections. Finally, pole owners may require prepayment of costs for make ready, but the costs should be equal to a reasonable estimate of make ready costs, and any overcharge should be promptly refunded by the pole owner, or the outstanding balance should be promptly paid by the occupant.

Inflation

Verizon argues that pole owners should not be able to automatically increase pole rental rates for inflation. Instead, rental rates should be based on actual costs. *See* AR 506 Verizon comments, 8 (Nov 17, 2006). Verizon asserts that owners are more than compensated for inflation because they do not pro-rate the rent, even if the attachment is present for less than the full year. *See id.*

PGE counters that there is a lag between a rental year and the determination of actual costs. *See* PGE comments, 9-10 (Nov 17, 2006). In order to recover its "actual costs," PGE argues that it should be able to apply an inflation factor to reflect the cost of providing pole space to occupants during the relevant period.

Staff also opposes an adjustment for inflation. *See* Staff comments, 6 (Nov 8, 2006). Staff argues that a rental rate will not necessarily increase every year, and that a utility's investment in its pole plant also does not necessarily increase every year. *See id.* In addition, the depreciation rate for poles may decrease, as the Commission recently authorized for PGE. *See* Order No 06-581, Appendix A, 13. Finally, Staff argues that setting a rate based on estimated increases in costs or plant investment would not comply with the statutory rate ceiling of "not more than the actual capital and operating expenses" of the pole owner. *See* Staff comments, 6 (Nov 8, 2006) (quoting ORS 757.282.

Conclusion

We decline to adopt an inflation rate for the pole rental rate formula. Costs will not necessarily rise each year, and even if they did, they will not always rise at the same rate. We do not believe that a lag adjustment is necessary.

Cost of Money for Consumer-Owned Utilities

Consumer-owned utilities assert that, in calculating pole rental rates, they should be able to include a cost of money component that resembles the cost of equity for investor-owned utilities. These utilities argue that all equity has a cost, which "is a

function of the risk to which the equity capital is exposed and the returns available from other investment alternatives." OTEC/1, Edwards/4. OTEC characterize pole rentals to non-members as "opportunity sales, which are made at the benefit of the equity owners." *id.* (emphasis in original). To come up with an appropriate return on equity, OTEC ran a discounted cash flow model, averaged it with the result of a capital asset pricing model run; OTEC then factored it in to produce a rate of return estimate of 8.27 percent for that utility.

OCTA argues that utilities are not allowed to recover more than their actual costs under ORS 757.282(1). While OCTA does not object to consumer-owned utilities recovering their actual cost of debt, it does challenge recovery of any purported cost of equity. OCTA asserts that consumer-owned utilities lack any actual "equity" capital costs, and therefore are not entitled to recover a hypothetical cost. *See* OCTA comments, 14 (Nov 17, 2006).

On the other hand, CLPUD and NWCPUD seek a calculation for just compensation for consumer-owned utilities. *See* CLPUD and NWCPUD comments, 5 (Nov 17, 2006). The PUDs acknowledge that they do not have "equity" costs in the same way the investor-owned utilities do, but raise the issue of opportunity costs that customers invest in utility plant and request that the Commission allow compensation for those costs. *See id.* at 7. To account for those costs, the PUDs support the two proposals made by Staff, as discussed below. *See id.* at 8-9. OJUA states that it was unable to reach consensus on whether consumer-owned utilities can recover their cost of money. *See* AR 506 OJUA comments, 1 (Nov 16, 2006).

Staff recognizes a cost of money for consumer-owned utilities, but takes a different approach than OTEC. Instead, Staff uses the most recent Commission general rate order decision adopting a rate of return, then adjusts it based on several factors. *See* Staff comments, 1-3 (Nov 17, 2006). The first option proposed by Staff would use the most recent cost of equity approved by the Commission in a general rate case, then deduct 4 basis points for every 1 percent of equity that the utility has in its capital structure. For instance, if the Commission approved a 10 percent cost of equity, a consumer-owned utility with 90 percent equity would have a 6.4 percent cost of equity (ten percent cost of equity reduced by four basis points for every one percent of equity in the capital structure is expressed as (10 - (90% x 4)), and results 6.4 percent cost of equity for that hypothetical consumer-owned utility); when factored in with its cost of debt, the resulting equation, which resembles that for the overall rate of return, would produce the cost of money. *See id.* at 2. Staff's second option uses the utility's embedded cost of long-term debt plus 100 basis points as a proxy for the utility's cost of money. If the utility does not have long-term debt, Staff recommends that the rate be set at the 10-year treasury rate as of the last traded day for the relevant calendar year, plus 200 basis points. Staff asserts that this would be a simple solution and easy to apply. *See id.* at 3. ORECA supports Staff's first proposal, which values equity at close to market cost. *See* ORECA comments, 2 (Nov 17, 2006).

Conclusion

No party disagrees that a consumer-owned utility should be able to include its cost of debt in pole rental rates. The issue here is whether the utility's cost of money should include an equity component, and, if so, at what interest rate. We believe that capital contributed by customers through rates should be treated like equity. OTEC argues that one factor to be considered in determining the cost of equity for a consumer-owned utility is the return available from other investment alternatives. We disagree, because the utility's customers are required to contribute this equity through rates and have no ability to invest it elsewhere. We focus instead on the other factor identified by OTEC: the risk to which the equity capital is exposed. We consider that risk to be lower for consumer-owned utilities in Oregon than for investor-owned utilities, mainly because as preference customers of the Bonneville Power Administration, the publics do not face as much volatility in power costs as PGE, PacifiCorp, and Idaho Power.

Both options proposed by Staff recognize this lower risk. The first option sets the cost of equity for consumer-owned utilities 200 basis points lower than the return on equity most recently adopted by the Commission for an investor-owned utility, before any adjustment for differences in capital structure. The second option assumes a smaller difference between the cost of equity and the cost of debt for consumer-owned utilities (200 basis points at a 50-50 capital structure) than the Commission recently authorized for PGE (362 basis points with a 50-50 capital structure). *See* Order No. 07-015, 48. We adopt Staff's second option. The calculation is straightforward and does not require the consumer-owned utilities to track the Commission's cost of equity and capital structure decisions.

ADDITIONAL ISSUES IN DOCKET AR 506

Costs of Hearing

ORS 759.660(2) provides, "When the order [related to the rates, terms and conditions of a pole attachment agreement] applies to a people's utility district, the order also shall provide for payment by the parties of the cost of the hearing. The payment shall be made in a manner which the commission considers equitable." A similar provision in ORS 757.279(2) applies to consumer-owned utilities, a category which includes people's utility districts. *See* ORS 757.270(2). "The cost of the hearing" refers to the Commission's costs in processing the complaint, holding the hearing, and preparing the order. The cost provision in ORS 757.279(2) was first enacted in 1983 to compensate the Department of Commerce for hearing pole attachment complaints over consumer-owned utilities; this Commission heard complaints regarding investor-owned utilities which fund the Commission through annual fees. When the Department of Commerce was abolished by the legislature in 1987, the cost provision was amended to allow the Commission to recover costs from utilities from which the Department of Commerce would have been entitled to recover. *See generally* Order No. 05-042, 17-19.

The OJUA requests that it be permitted to act as an advisor to the Commission in any cases between a pole owner and a pole occupant without being subject to hearing costs. *See* AR 506 OJUA comments, 9 (Nov 16, 2006). The OJUA seeks to strike any limiting language, arguing that it "adds significant value to attachment contract disputes and should not be charged the costs of hearing regarding these disputes." *Id.*

ORECA refers to the statutory language "the order shall also provide for payment *by the parties* of the cost of the hearing" and argues that all parties should be liable for costs of a hearing when a consumer-owned utility is involved. *See* AR 506 ORECA comments, 3 (Nov 16, 2006) (quoting ORS 757.279(2)). ORECA expresses concern that any other interpretation would lead to the Commission billing all costs of a hearing to a consumer-owned utility, when some costs are also attributable to other parties. *See id.* Further, any other interpretation would lead to the consumer-owned utility subsidizing other carriers and their customers. *See id.* To prevent this, ORECA favors the conclusion reached in *CLPUD v. Verizon*, UM 1087, Order No. 05-042, 17-19. *See id.*

Conclusion

The Commission chose not to charge the parties for the costs of hearing in *CLPUD v. Verizon* because that case was the "first of its kind, and the cost [of hearing] provision had never been invoked," and to give a bill to the parties at the end of the case would have been an unfair "surprise." *See* Order No. 05-042, 19. In that order, the Commission did signal to parties that they may be responsible for costs in the future. *See id.* In adopting this rule, we attempt to give some guidance as to the costs that will be assessed.

We understand the statute to read that the cost of hearing should be divided among the parties in the case. The cost of hearing should be apportioned among parties according to factors such as whether a party unreasonably delayed the proceeding or burdened the record. What is less clear from the statute and its history is whether utilities that already pay fees to the Commission should be *charged* their portion of the costs of hearing because their fees already go to the Commission's budget for hearing costs. That issue should be briefed in a future proceeding.

Finally, we clarify the provision referring to the OJUA, to state that the OJUA will not be charged costs when it is acting as an advisor to the Commission. That was the intent of the original provision, but we adopt OJUA's modification to eliminate any misunderstanding.

Resolution of Disputes

The OJUA recommends that the Commission only hear challenges to new or amended contractual provisions. *See* OJUA comments, 3 (Nov 16, 2006). The OJUA believes that existing rates, terms and conditions within a contract should not be

challenged, and only new provisions may be brought to the Commission for resolution. *See id.* To bolster its argument, the OJUA points to ORS 757.285 which states that the rates, terms and conditions of pole attachment contracts are presumed reasonable unless a complaint is brought to the Commission. *See id.*

ORECA expresses a concern that the complaint process will be used to only raise one component of the contract, and not consider the contract as a whole. *See* ORECA comments, 3 (Nov 17, 2006). ORECA asserts that this "disregards the full contract negotiations," and does not consider the compromises made by both sides. *See id.*

Conclusion

Under ORS 757.279(1), as well as Commission practice and procedure, we cannot refuse to hear a complaint on a contract that has provisions asserted to be unjust or unreasonable by a pole occupant or owner. Further, following the FCC's practice, we have jurisdiction not only over the contract, but over implementation as well. *See Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 133 FCC Rcd 13407, 13408-09 (rel July 14, 1998). If a complaint is made by one party to contest certain provisions, the other party may respond by raising other provisions that were intended as a compromise to the contested provisions. However, we will not limit the scope of a prospective complaint at this time.

Threshold Number of Poles

CLPUD and NWCPUD recommend an extended period of time for utilities to process voluminous attachment requests. *See* CLPUD and NWCPUD comments, 3-5 (Nov 17, 2006). To allow for this extension, the "threshold number of poles" should be amended to "capture the concept that multiple applications for pole attachment can be submitted consecutively in a short period of time," and that "cumulatively the applications could request access in numbers that exceed the 'threshold.'" *See id.* at 4. To that end, the PUDs propose modifications to the definition of "threshold number of poles," in OAR 860-028-0020, as well as the treatment of the applications in OAR 860-028-0100(6). *See id.*

PacifiCorp supports Staff's modified definition of "threshold number of poles" that includes all applications submitted during any 30 day period. *See* PacifiCorp comments, 4 (Nov 17, 2006).

Conclusion

We agree with the modified definition of "threshold number of poles" that accounts for the threshold number over multiple applications submitted over a 30 day period. Staff's modified definition is adopted.

Application Process

The OJUA supports Staff's proposal, in which a pole owner may deny access for reasons of insufficient capacity, safety, reliability, and generally applicable engineering purposes, and the pole owner is required to state the reasons for denial. *See* OJUA comments, 4 (Nov 17, 2006).

PacifiCorp expresses concern that an application would be deemed approved if there is no response within 45 days, and asserts that it is contrary to ORS 757.271(1) which requires "authorization from the utility allowing the attachment." *See* PacifiCorp comments, 4 (Nov 17, 2006). The utility recommends a safety net, in which the occupant provides another notice to the pole owner and a 10-day window for response. *See id.*

Conclusion

The provision allowing a pole owner to reject an application for capacity and safety reasons conforms to federal law, and we adopt that provision. Further, in keeping with the safe harbor provisions discussed in the sanctions rules, we adopt PacifiCorp's suggestion.

Duties of Pole Owners

Charter proposes seven "essential" duties of structure owners, culled from other jurisdictions, including standard notice requirements, pole labeling, and detailed invoices. *See* Charter comments, 6-7 (Nov 17, 2006). Charter also advocates for some kind of "specific mechanism to ensure that pole owners acquire and submit accurate audit and inspection data" as well as coordinate joint use of poles. *See id.* at 7. Charter further expresses concern that pole owners pay costs related to their own service and engineering and safety requirements, particularly as pole owners begin to offer services that compete with other pole attachers. *See id.*

OJUA also recommends modification of Staff's proposed Duties of Pole Owners. *See* AR 506 OJUA comments, 4-5 (Nov 16, 2006). The modifications clarify the duties as proposed by Staff and add other duties. *See* OJUA redline draft rules, OAR 860-028-0115 (Nov 16, 2006). The additions include permission to charge an occupant for any costs incurred related to "noncompliant attachments," a requirement that inspection data be accurate before transmission to the pole occupant, and notification of what type of data will be collected during a periodic inspection if the pole owner intends to bill the occupant separately. *See id.*

Conclusion

We adopt most of the OJUA's modifications because they represent a compromise among a cross-section of industries involved in pole attachments. We decline to adopt the allowance costs incurred by a non-compliant attachment; a similar

provision is set forth under OAR 860-028-0110(3). Also, in light of our decisions regarding the rental rate formula provisions and our conclusion that periodic inspection costs of occupant's facilities should not be charged separately, we decline to adopt the OJUA's proposal regarding contact about the type of data to be collected. We do adopt the requirement that data be accurate, which mirrors Charter's suggestion. We decline to adopt the remainder of Charter's proposals because they will impose additional costs, without a full discussion of the benefits. We encourage the utilities to continue to work together on projects such as pole labeling and joint inspections to ensure greater accuracy in remedying safety violations.

Vegetation Management around Communications Lines

The OJUA favors making the "Duties of Pole Occupants" and "Duties of Owners" mandatory, and incorporating vegetation management in these provisions. *See* AR 510 OJUA comments, 2 (Nov 16, 2006). The OJUA also proposes language requiring trimming of vegetation which poses an "imminent danger to life or property," and includes an occupant duty to respond to a notice of hazardous vegetation with either a trimming program or a notice of correction within 180 days. Parallel provisions are proposed for OAR 860-028-0115, which sets forth the Duties of Structure Owners. The OJUA notes that electric pole owners are already subject to stricter vegetation trimming requirements, so the new rule would only apply to communications pole owners. *See* AR 510 OJUA comments, 3 (Nov 17, 2006).

ORECA supports Staff's proposal making operators of communication facilities responsible for vegetation management around their lines. *See* ORECA comments, 3 (Nov 17, 2006). Specifically, ORECA endorses language that would require operators to trim or remove vegetation that poses either a significant risk to its facilities or, through contact with its facilities, poses a significant risk to a structure of an operator of a jointly used system. *See id.* Further, tree-trimming should be mandatory, not an optional duty. *See id.* at 4.

At the opposite pole, Verizon recommends there be no provision for communications operators trimming vegetation around their facilities. The company notes that electricity providers have statutory immunity for liability related to trimming vegetation, but communications operators do not. *See* AR 510 Verizon comments, 18 (Nov 17, 2006).

OCTA also argues against Staff's proposal for communications attachers having the same vegetation management obligations as electric utilities. *See* OCTA comments, 13 (Nov 17, 2006). OCTA argues that vegetation around communication lines poses a much lower threat than vegetation around power lines, because communication lines have little or no voltage and are insulated and sheathed, compared to high voltage bare energized power lines. *See id.* Finally, OCTA contends that requiring communications owners to trim around their lines would substantially benefit electric owners: because trees grow from the ground up and communication lines are lower on the pole, communications trimming would result in branches never posing a